BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT L. NELSON Claimant VS. **KROY INDUSTRIES** Respondent AND **TRAVELERS INDEMNITY CO. OF AMERICA** Insurance Carrier	)	Docket No. 1,040,057

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 11, 2008, preliminary hearing Order for Compensation entered by Administrative Law Judge Pamela J. Fuller. Geoffrey L. Schmidt, of Overland Park, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an injury that arose out of and in the course of his employment; that claimant provided notice of his back pain within 10 days but indicated the cause of the pain was unknown, and then gave actual notice of his injury within 75 days of the onset of the pain. The ALJ found just cause existed and held that claimant provided timely notice of injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 6, 2008, Preliminary Hearing and the exhibits; the transcript of the deposition of Kent Knoll taken June 6, 2008, and the exhibits; the transcript of the deposition of Derek Martinez taken June 6, 2008, and the exhibit; and the transcript of the deposition of Larry Gustafson taken June 6, 2008, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends the claimant did not sustain an injury by accident that arose out of and in the course of his employment, that he also did not provide timely notice of his alleged accidental injury, and that there was no just cause to extend the statutory 10-day notice period.

Claimant asserts he was injured by accident that arose out of and in the course of his employment and that he gave timely notice of his accident.

The issues for the Board's review are:

(1) Did claimant suffer injury from an accident that arose out of and in the course of his employment?

(2) Did claimant give timely notice of his alleged injury?

FINDINGS OF FACT

Claimant started working for respondent on April 13, 2007, as a machine operator making PVC pipe. Before being hired, he was required to have a preemployment physical where his back, balance and ability to lift were tested. Claimant was on probation for six months and first became eligible for fringe benefits, including health insurance and disability insurance, on November 1, 2007. His job required heavy lifting of over 100 pounds and required bending and twisting of his back. Claimant testified that in 1991, he had been injured when a vehicle came through a store he was in and he was hit by some debris. He was told at that time that he had a bulging disk. He had no surgery from that incident and had been able to perform all his work activities at respondent until November 6, 2007.

On November 6, 2007, claimant experienced low back pain that was more severe than normal. Because he did heavy lifting during his 12-hour shift at work, he would get stiff on a daily basis, but the pain on November 6 was more of a sharp, weakening pain. Claimant testified he told his supervisor, Derek Martinez, that he had low back pain but that he did not know if he had strained his back at work or if he had a kidney infection. He also told Mr. Martinez he was going to make a doctor's appointment to see what was going on, and he made an appointment for November 8 with his personal physician. He admits he did not ask respondent to provide him with medical treatment. He finished out his 12-hour shift on November 6.

The morning of November 7, claimant had trouble getting out of bed, so he called in to work and asked the receptionist to relay a message to his supervisor that he was going to the doctor. Because he was not sure the receptionist would relay the message,

he went in to work until it was time to leave for his appointment. He worked about 15 minutes before leaving for his doctor's appointment.

Claimant went to see his personal physician, Dr. Neal Brockbank, on November 7. A urinalysis ruled out a kidney infection, so Dr. Brockbank ordered an MRI. Claimant went back to work and told Mr. Martinez that he did not have a kidney infection and that the problem was his low back. He said he would be having an MRI the next day.

Claimant went back to work on Saturday, November 10, and spoke with Mr. Martinez and Jimmy DeLeon, a quality control manager. Mr. DeLeon told him he needed to fill out an accident report, which claimant did to the best of his ability. Mr. DeLeon told him to be sure to turn in the accident report. Claimant then contacted Kent Knoll, respondent's Operations Manager, by phone. Since it was a Saturday, Mr. Knoll was not in the office.

On November 12, claimant saw Dr. Brockbank and was told that the MRI revealed a mass on his spine that appeared to be a tumor or a cyst. After this appointment, claimant went to see Mr. Knoll. He testified he told Mr. Knoll what Dr. Brockbank said about the results of the MRI and also said he wanted to fill out an accident report. He claims he also told Mr. Knoll that he had reported having back problems to Mr. Martinez on November 6. Claimant said that Mr. Knoll told him the injury would not be recognized as a workers compensation injury because there was no report of accident. Mr. Knoll told claimant he would be eligible for short-term disability and provided claimant with the papers to apply for that. Claimant then applied for short-term disability.

A second MRI was performed on November 15, 2007. The report of that MRI states that the mass noted on claimant's spine was suspected to be "a large free disc fragment arising from the L2-L3 disc space with caudal migration."[1] As part of claimant's application for short-term disability, Dr. Brockbank filled out the Attending Physician's Statement, in which he set out that claimant had "severe back and left leg [and] groin pain" and gave his diagnosis as "spinal stenosis, free disk fragment L2-L3."[2] Dr. Brockbank indicated that the cause of the disability was "unknown."[3] Claimant was approved for short-term disability benefits, and the bills for his medical treatment were submitted to his personal health insurance.

Dr. Brockbank referred claimant to Dr. John Gorecki, a neurosurgeon. Claimant first saw Dr. Gorecki on December 5, 2007. Dr. Gorecki's medical records of that date show that claimant told him that "he thought he was injured on-the-job but this was not

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[1] P.H. Trans., Cl. Ex. 2 at 6.

[2] Knoll Depo., Ex. 2 at 2.

[3] *Id.*

recognized as a workers' compensation injury."[4] Dr. Gorecki performed surgery on December 13, 2007.

On May 16, 2008, Dr. Brockbank wrote claimant's attorney and indicated:

> [I]t is my opinion because as [claimant] had not had any injury with his new employment that could account for such significant findings that probably it was a preexisting condition, however it has probably been in a stable positioning and for this reason he was not having any problems and was able to function quite normally, and that the condition was then exacerbated. Exactly how this was done I honestly can't say, but I feel that it was a preexisting condition which at his new employment was exacerbated and aggravated which led to his worsening of symptoms, which did indeed require the need for surgery.[5]

Testimony was taken by deposition from Kent Knoll, Derek Martinez, and Larry Gustafson, who is respondent's General Manager. Mr. Knoll testified that as operations manager, he handles personnel and safety issues and is involved in providing orientation to new employees. He stated that new employees are told at orientation that work injuries are to be reported to him immediately. At that time, the injured employee would be given a drug screening and then Mr. Knoll would schedule a doctor's appointment. An employee handbook also sets out the procedures to follow for work-related injuries. Although employees do not receive a copy of the handbook until after they have been employed for six months, a copy of the handbook is available in the employee break room.

Mr. Knoll stated he first learned of claimant's back problems on November 7. On that day claimant had called in and said he was unable to work, and then came into work. Mr. Knoll said that claimant told him he had problems with his kidneys and was going to see a doctor. He testified that claimant did not report to him on November 7 that he had hurt himself at work, so he did not attempt to set up a drug screen or accompany claimant to the doctor.

The next time Mr. Knoll spoke with claimant was on Saturday, November 10, when claimant called him on his cell phone. Claimant told him he was having problems, that an MRI had been done, and that he did not feel he should work until he got the results. Claimant said during that conversation that the only place he could have hurt his back was at work, but he did not ask to file a workers compensation claim. Mr. Knoll admits that he suggested to claimant that they wait for the results of the MRI.

Mr. Knoll spoke with Mr. Martinez on Monday, November 12, and asked if claimant had said anything to him about any problem or accident. Mr. Martinez told him nothing had

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[4] P.H. Trans., Cl. Ex. 5 at 1.

[5] P.H. Hearing, Cl. Ex. 3.

been turned into him. Mr. Knoll admitted he did not know what claimant told Mr. Martinez on November 6. He also admitted that if claimant had told Mr. Martinez there was a possibility his back problem was work related, it would have been appropriate for an accident report to have been filled out. Even if it turned out not to be work related, under that scenario, it would have been proper to fill out an accident report. Mr. Knoll further testified that he was not aware that Mr. DeLeon told claimant on November 10 to fill out a work accident form.

Claimant came into work on Monday, November 12, at which time he told Mr. Knoll that the doctor had told him he had a cyst on his spine and would need surgery. Claimant did not give Mr. Knoll any indication that the cyst was work related, so he assumed claimant had a health problem, not a work-related injury.

> Q. [by respondent's attorney] . . . And, again, at this point has he said anything to you–As you're talking to him on Monday about the cyst, was there any suggestion to you that this should be submitted as a workers' compensation claim?
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> A. [by Mr. Knoll] The only thing Robert did say that he felt–or he thought, you know, it might have been. But, you know, I told him we were waiting to see the results of the test. And he talked like it was a cyst and we didn't feel like it was any kind of a claim.
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> Q. And when he told you that the doctor had diagnosed a cyst, was he seeking–At that point did he ever ask you for a work comp accident report form or any other kind of workers' compensation benefits?
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> A. No, he did not.[6]

Mr. Knoll further testified:

> Q. [by claimant's attorney] . . . I guess the conversation I'm referring to is–would have been on Monday, the 12th. You're stating under oath he did not come to you with a workers' compensation form, nor discuss workers' compensation benefits at that time?
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> A. [by Mr. Knoll] He did not bring the workers' compensation papers in.
>
> Q. The form that I marked, which was Preliminary Hearing Exhibit 4, you did not reject and advise him that this would never be considered work comp? Do you recall that conversation with him?

[6] Knoll Depo. at 13.

> A. He had discussed and asked a little bit about it, but I told him we were waiting for the results of the MRI. When the MRI results came back and said there was a cyst, we assumed that it was a health problem.
>
> Q. So, he indicated to you that he thought–like you testified to on direct already–he thought it might be work comp related.
>
> A. It was just a discussion of it.[7]

Mr. Knoll also testified that he was aware after receiving claimant's application for short-term disability that his diagnosis was a free disk fragment from L2 to L3 and that he had severe back and left leg groin pain which appeared on November 7, 2007 He continued to testify:

> Q. [by claimant's attorney] You're stating that you never advised [claimant] that this wasn't work comp related and therefore he should complete the Social Security [*sic*] Disability form? Or I didn't understand your testimony exactly.
>
> A. (No response.)
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> Q. Did you state to him that this wasn't work comp related? Yes or no?
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> A. [by Mr. Knoll] It's a gray area there, because he had indicated that it was, you know, he thought there could be a possibility. And I told him, "Let's wait until we find out the results of the MRI and see what the MRI says."
>
> Q. Since you're the Personnel person and he advises you that there's potentially a possibility that there's a work comp, why didn't you report an accident form?
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> A. Because he had been telling me all along that it was a kidney problem.[8]

Mr. Knoll provided claimant with the short-term disability application papers and the FMLA papers in an effort to set him up for disability payments. He kept in contact with claimant every two weeks to make sure he was getting the disability checks. Claimant did not ask for workers compensation benefits during the remainder of November or December. Claimant's treatment continued through March 2008, and Mr. Knoll continued to speak with him every two weeks. Claimant was terminated on April 1, 2008.

Derek Martinez is a foreman at respondent and was claimant's supervisor. He was aware that claimant had a problem with his back but said claimant never told him he was

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[7] Knoll Depo. at 28-29.

[8] Knoll Depo. at 31-32.

having problems with his back because of his work activities. Rather, claimant told him he had a problem with his kidneys. Claimant never asked to fill out an accident form.

Mr. Martinez did not remember if claimant was moving a 15-inch pipe on November 6. He said claimant told him one time that he was feeling pain in his back, but he never filled out an accident form. He did not know why he did not fill out an accident report and admitted he made a mistake by not doing so. He acknowledged that the employee handbook requires him to fill out an accident report when an employee reports pain.

Mr. Martinez said he did not remember claimant leaving on November 7 to go to a doctor's appointment. Mr. Martinez did not remember if Mr. DeLeon told claimant that he needed to fill out an accident report if he had gotten hurt on the job.

Larry Gustafson is respondent's General Manager. He became aware the claimant had a back problem on November 7. Claimant came in to his office and told him that he would not be able to work that day because he had pain around his kidneys and thought he had a kidney infection caused by medication he was on. For that reason, he did not have claimant fill out an accident report.

Mr. Gustafson never spoke with Mr. Knoll, Mr. Martinez, or Mr. DeLeon about whether claimant had a work-related injury. He was not aware that Mr. DeLeon told claimant to fill out an accident report and did not know how claimant got an accident report form. Mr. Gustafson agreed that the employee manual requires an accident report to be filled out for a potential work-related accident and that no report was filled out by Mr. Martinez, Mr. Knoll, or Mr. DeLeon.

Mr. Gustafson did not have claimant fill out an accident report because claimant told him he was having back problems related to his kidneys or to some medication. He did not reject an accident report brought to him by claimant.

Claimant spoke with Mr. Gustafson on December 12, the day before his surgery. At that time claimant mentioned that the only place he could have hurt his back would have been at work. At that time, Mr. Gustafson told claimant that there was no record of it nor had there been any accident report.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[12] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[13] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[14]

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[9] K.S.A. 2007 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[11] *Id.* at 278.

[12] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[13] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[14] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

In considering whether just cause exists, the Board has listed several factors which must be considered: (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually; (2) whether the employee is aware he or she has sustained an accident or an injury on the job; (3) the nature and history of claimant's symptoms; and (4) whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

The purpose of K.S.A. 44-520 is to "afford the employer an opportunity to investigate the accident and to furnish prompt medical treatment."[15]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

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[15] *Pike v. Gas Service Co.*, 223 Kan. 408, 409, 573 P.2d 1055 (1978).

[16] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[17] K.S.A. 2007 Supp. 44-555c(k).

ANALYSIS

Claimant relates his back injury to heavy lifting at work on November 6, 2007. Although there was some suspicion initially that claimant's back symptoms might be related to a kidney infection, this was soon ruled out by a urinalysis. Likewise, although the initial MRI detected a mass that was identified as possibly a cyst or tumor, it was eventually determined to be a disc fragment. Dr. Brockbank believes this loose disc fragment may have preexisted claimant's alleged date of accident but opines claimant's employment exacerbated and aggravated his condition. In other words, if there was a disc fragment at L2-L3 before November 6, 2007, it moved, became unstable, and caused impingement as a result of claimant's work activities. Therefore, claimant's worsening symptoms and resulting need for surgery were due to a work-related aggravation.

Claimant reported his low back pain to his supervisor, Mr. Martinez, on the date of accident, November 6, 2007. He advised Mr. Martinez that it may be work-related or may be a kidney infection so he was going to his doctor to find out. The next day, after seeing his doctor, claimant told Mr. Martinez that it was not a kidney infection but was instead his back. This constituted notice of a work-related injury. Mr. Martinez admits that he should have completed an accident report.

Claimant again reported a work-related back injury to Mr. Martinez, Mr. Knoll and Mr. DeLeon on November 10, 2007. In addition, claimant asked Mr. Knoll about completing an accident report on November 12, 2007. The purpose of the notice requirement was satisfied by these conversations. Claimant has met his burden of proving that he satisfied the statutory obligation to report the work-related accident within 10 days.

CONCLUSION

(1) Claimant suffered personal injury by accident arising out of and in the course of his employment with respondent.

(2) Claimant gave timely notice of his accident and injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated June 11, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Geoffrey L. Schmidt, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge